

MYRELD R. COLLINS
Claimant

DIRECTORY DISTRIBUTING

Respondent

LEGION INSURANCE COMPANY
Insurance Carrier

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ORDER

APPEARANCES

RECORD AND STIPULATIONS

¹ Settlement Hearing Tr. at 2.

was a stipulation that medical was incurred in the amount of \$4,758.89. Claimant's counsel replied that the medical expenses incurred by claimant were substantially in excess of that amount, and further informed the Court, "we are not resolving past medical care/medical bills in this case."² During the settlement hearing the medical bills were described as totalling approximately \$60,000.

ISSUES

Claimant argues that the ALJ's failure to award penalties and attorney fees was error because respondent and its insurance carrier failed to pay ordered medical bills when due and likewise failed to pay within 20 days following service of claimant's demand for payment pursuant to K.S.A. 44-512a. In addition, claimant argues that because this is a post-award proceeding, the ALJ erred by not entering an award for attorney fees pursuant to K.S.A. 2000 Supp. 44-536(g).

Respondent and its insurance carrier (hereinafter respondent) contend that they are not responsible for the payment of a civil penalty nor attorney fees because (1) there is no evidentiary showing that the bills were valid or authorized, (2) there is no evidence of timely service of a demand pursuant to K.S.A. 44-512a, (3) medical bills are not due before the proper amounts are ascertained, (4) claimant failed to prove the medical bills were for the treatment of injuries that were causally related to the accident and that the services were reasonable and necessary to cure and relieve the effects of the injury and (5) claimant failed to prove that the fees were valid pursuant to the workers compensation medical fee schedule.

Whether one or more of respondent's defenses was the basis for the ALJ's denial of penalties and attorney fees cannot be ascertained. The ALJ's Order consists of one sentence and simply states that "[t]he Claimant's request for penalties is denied."

FINDINGS OF FACT AND CONCLUSIONS OF LAW

K.S.A. 1999 Supp. 44-501(a) provides in part:

If in any employment to which the workers compensation act applies, personal injury by accident arising out of and in the course of employment is caused to an employee, the employer shall be liable to pay compensation to the employee in accordance with the provisions of the workers compensation act.

K.S.A. 2000 Supp. 44-510h(a) provides:

² Settlement Hearing Tr. at 2.

It shall be the duty of the employer to provide the services of a health care provider, and such medical, surgical and hospital treatment, including nursing, medicines, medical and surgical supplies, ambulance, crutches, apparatus and transportation to and from the home of the injured employee to a place outside the community in which such employee resides, and within such community if the director, in the director's discretion, so orders, including transportation expenses computed in accordance with subsection (a) of K.S.A. 44-515 and amendments thereto, as may be reasonably necessary to cure and relieve the employee from the effects of the injury.

K.S.A. 44-512a(a) provides:

In the event any compensation, including medical compensation, which has been awarded under the workers compensation act, is not paid when due to the person, firm or corporation entitled thereto, the employee shall be entitled to a civil penalty, to be set by the administrative law judge and assessed against the employer or insurance carrier liable for such compensation in an amount of not more than \$100 per week for each week any disability compensation is past due and in an amount for each past due medical bill equal to the larger of either the sum of \$25 or the sum equal to 10% of the amount which is past due on the medical bill, if: (1) Service of written demand for payment, setting forth with particularity the items of disability and medical compensation claimed to be unpaid and past due, has been made personally or by registered mail on the employer or insurance carrier liable for such compensation and its attorney of record; and (2) payment of such demand is thereafter refused or is not made within 20 days from the date of service of such demand.

Respondent argues claimant failed to comply with the service requirements for a 20-day demand letter pursuant to K.S.A. 44-512a and that there is no evidence of timely service. A review of the record does not reveal a certified letter, return receipt. Furthermore, the certificate of service on claimant's demand for compensation states that the "document was deposited in the United States mail, first class, postage prepaid, on the 21st day of April, 2000" with separate copies being addressed to respondent and respondent's counsel. During oral argument to the Board, claimant's counsel stated that the certificate of mailing was erroneous and, in fact, the demand was sent by certified mail with a return receipt showing service on May 2, 2000. Respondent failed to make service an issue before the Administrative Law Judge at a time when claimant's counsel could have responded and rectified his error by introducing the return receipt into evidence. The issue should not be raised for the first time on appeal. In addition, claimant's counsel stated at the August 8, 2000 motion hearing that "I then filed a demand on that order on April 21, 2000. And that was received by respondent and their lawyer on May 2 of 2000. And 20 days ran then on May 22 of 2000. I believe that is all in the record on my motion

for penalties."³ Respondent's counsel never disputed that the demand for compensation was received and never disputed that the 20 days ran on May 22, 2000. In fact, several of the affidavits introduced by respondent used the May 22, 2000 date which indicates its acceptance by respondent as the date by which payment was due. Furthermore, at page 7 of the Motion Hearing Transcript, respondent's counsel acknowledged receipt of the 20-day demand letter, although he did not specify the date it was received. It is apparent that neither its receipt nor the date of its receipt was at issue before Judge Clark.⁴

Claimant injured his back on September 7, 1999 when he fell while loading books. Claimant received in-patient treatment at Riverside Hospital in Wichita, Kansas. Whether it was the claimant or the respondent that selected the treatment provider is unknown, but respondent's counsel stated during oral argument to the Board that respondent has never disputed the compensability of this claim. It appears then that the extent of any permanent disability and the reasonableness of the medical treatment expenses were the only issues in dispute. The nature and extent issue was resolved at the April 12, 2000 settlement hearing but the issue of "past medical care/medical bills" was not.

Respondent's counsel stated at the settlement hearing:

The employer is already under a preliminary order to pay all valid and authorized medical expenses that were incurred in the past. The settlement worksheet contemplates that will be done. A problem arose, judge, in the Riverside Hospital, **until recently** refused, neglected or whatever word I want to use, it probably doesn't matter why, they had not given up any medical records concerning care. The order that was issued by the judge allowed the insurance carrier an opportunity to audit the bills before payments were made. That is in the process of being done. (Emphasis added.)"⁵

After some discussion, Special ALJ John Nodgaard, stated the positions of the parties as follows:

THE COURT: We just had an off-the-record discussion with respect to the question on the penalties hearing which is set for tomorrow morning. It is the court's understanding based upon the discussion and Mr. Riedmiller has fully explained that to his client that the issue with respect to the payment of the medical bills is still before the court but the claimant is agreeing to waive his claim for penalties as of today. Claimant is not giving

³ Motion Hearing Tr. at 5.

⁴ See Kelly v. Phillips Petroleum Co., 222 Kan. 347, 566 P.2d 10 (1977).

⁵ Settlement Hearing Tr. at 3.

up his claim for penalties in the future if, in fact, those medical bills do not get paid in a timely manner. Is that the agreement of the parties, gentlemen?

MR. REIDMILLER [sic]: Yes.

MR. JURCYK: Yes.

THE COURT: It is also the court's understanding that based upon the off-the-record discussion that all authorized and related medical expenses incurred through today's date will, in fact, be paid subject to the review by the insurance carrier of those bills and in accordance with the fee schedule. The claimant by virtue of this settlement is giving up rights to any future medical treatment, is that correct?

MR JURCYK: Yes.

MR. REIDMILLER [sic]: Yes.⁶

As a part of the settlement, however, claimant agreed to waive penalties for respondent's alleged past failure to pay the medical expenses when due and the hearing on claimant's Motion for Penalties which had been scheduled to be heard on the day following the settlement hearing was canceled.

Thereafter, the Special ALJ determined that the proposed settlement was fair, just and reasonable and approved the agreed upon lump sum as a full redemption of the award in accordance with K.S.A. 44-531. The Special ALJ further stated:

Pursuant to the parties' agreement which the court has already made a record on, this matter will remain open for the purposes of settlement of the authorized and related medical expenses which have not yet been paid and which are still in dispute. In making this award, I am in no way limiting the claimant in filing additional applications for penalties after today's date if those bills are not paid and satisfied within a timely manner.⁷

Thus, contrary to the assertion by claimant's counsel to Judge Clark at the Motion Hearing, the Special ALJ did not order all outstanding medical bills to be paid.⁸ K.S.A. 44-512a(a) contemplates that there be an award or order in effect before there can be a penalty imposed for the employer's or the insurance carrier's failure to pay the medical compensation when it was due. As the settlement hearing failed to result in an order for payment of past medical, respondent's liability is pursuant to Judge Clark's January 25, 2000 preliminary hearing Order. That order provided:

⁶ Settlement Hearing Tr. at 5-6.

⁷ Settlement Hearing Tr. at 14.

⁸ Motion Hearing Tr. at 4.

Respondent to reimburse Claimant for pharmacy bill of \$59.71. Medical bills from Sedgwick County EMS for \$378.00, from Dr. Ronald Levy for \$142.00, from RHS West Central Clinic for \$1,624.96, and from Riverside Hospital for \$46,854.80 were incurred through authorized health care providers. Respondent is ordered to pay these bills pursuant to the medical fee schedule and so long as each of the bills is reasonably related to and made necessary by the injury of September 7, 1999.

On January 26, 2000, claimant sent respondent a Demand for Compensation pursuant to the preliminary hearing Order. Thereafter, a Motion for Penalties and a Notice of Preliminary Hearing were mailed on March 1, 2000. Claimant's counsel represented that attached thereto were itemized statements for all the medical treatment and services provided to claimant. The hearing on the Motion for Penalties was scheduled for April 13, 2000. As stated above, that hearing was canceled pursuant to the parties' agreement at the settlement hearing.

Claimant sent respondent's attorney a second Demand for Compensation on April 21, 2000, again with copies of the medical bills attached, and which sought "payment of all compensation due and owing to the Claimant under an Award entered by Special Administrative Law Judge, John C. Nodgaard, on April 12, 2000." It then itemized the following list of "outstanding medical bills":

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|-----|--|-------------|
| 1. | Sedwick County EMS | \$ 317.54 |
| | (See three page bill outlining reimbursement to Medicare) | |
| 2. | RHS Clinic | \$ 2,043.00 |
| 3. | Pulmonary Specialists | \$ 262.00 |
| 4. | Riverside Home Care | \$ 5,030.00 |
| 5. | Dr. Levy | \$ 3,006.00 |
| 6. | Riverside Hospital #406045 | \$ 8,286.85 |
| 7. | Riverside Hospital #404161 | \$43,297.06 |
| 8. | Westside Anesthesia | \$ 880.00 |
| 9. | Kansas Cardiac Clinic | \$ 180.00 |
| 10. | Broadway Home Health | \$ 317.54 |
| | (Balance on chairlift order by Dr. Pollock) | |
| 11. | Reimbursement to Claimant | \$ 403.97 |
| | (For partial payment on chairlift from Broadway Home Health) | |

This list is significantly different from that ordered paid by Judge Clark on January 25, 2000. K.S.A. 44-512a(a) requires that the allegedly ordered and unpaid compensation be set forth with particularity. Claimant's Demand for Compensation fails this test. There was no award for payment of medical compensation entered by Special ALJ Nodgaard and this demand makes no mention of Judge Clark's January 25, 2000

Order. Because the demand is inadequate, claimant's request for penalties is denied. This finding renders moot the remaining issues/defenses raised by respondent.

K.S.A. 2000 Supp. 44-536(g) provides for an award of attorney fees for services rendered "subsequent to the ultimate disposition of the initial and original claim." Because the issue of past medical expense was left open at the April 12, 2000 settlement hearing, this is not a post-award proceeding. There has been no final order issued with respect to the payment of past medical expenses. Accordingly, claimant's request for post-award attorney fees pursuant to K.S.A. 2000 Supp. 44-536(g) is denied.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the August 8, 2000 Order entered by Administrative Law Judge John D. Clark should be, and is hereby, affirmed.

IT IS SO ORDERED.

Dated this ____ day of January 2001.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Roger A. Riedmiller, Wichita, KS
John David Jurcyk, Lenexa, KS
John D. Clark, Administrative Law Judge
Philip S. Harness, Director